No. 150.

Specification of errors by Resps.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 150.

UNITED STATES RUBBER COMPANY, et al.
PETITIONERS.
vs.
AMERICAN OAK LEATHER COMPANY et al.,
RESPONDENTS.
} Certiorari to Circuit Court of Appeals for Seventh Circuit

Specification of Errors by Respondents.

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Geo. Hornstein Co., Printers, Chicago.

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Brief and Argument for The American Oak Leather Company et al., Respondents.

Specification of Errors by Respondents.

SPECIFICATION OF ERRORS RELIED UPON.

The parts of the decree of which the appellants (Respondents here) complain may, for the purpose of brief statement, be grouped under four general heads.

First. That it was error not to hold that the conduct of the United States Rubber Company, L. Candee & Co., and the Metropolitan National Bank, was such as to bar them from participating in the distribution of the fund, as against the appellants, who had been induced to deal with Fargo & Co., and become its creditors, after January 6, 1896.

Second. That it was error to hold that the procuring of the $10,000 by Fargo from the Bank for the personal

use of himself and his brothers, and the advancing of the money by the Bank, with knowledge of the purpose for which it was to be used, and including this amount (of $10,000) in the Bank's claims and judgment, was not such a fraud on the other creditors as prevented the Bank from sharing *pro rata* with them, or at least from including the $10,000 as a part of its claim.

Third. That it was error not to hold that all the judgments obtained by both the Rubber Companies and the Bank, and also the assignment of the accounts, were permeated and vitiated by actual fraud, by reason of the fact that the Rubber Companies, with full knowledge of the facts as to the $10,000 advanced to the Fargos, knowingly permitted this $10,000 to be included in the Bank's claim, and assisted the Bank in obtaining the conveyance of the Dixon real estate and its judgment for $25,000, while, at the same time, the Rubber Companies and the Bank had entered into an agreement, by the terms of which the Rubber Companies and the Bank had agreed to share *pro rata* in the proceeds, not only of the Rubber Companies' judgments and the assignment of accounts, but also in the proceeds of the Dixon real estate and the Bank's judgment.

Fourth. That it was error to hold that notwithstanding the satisfaction by the Metropolitan National Bank of $25,000 of its debt against Fargo & Co., it was still a creditor to the full amount of $50,000, and entitled to share in the distribution on that basis.

The first three of these errors involve a consideration of the Master's findings of fact and the exceptions to his report; the fourth is based upon the decree alone, the Master having made no finding with reference to it, except a statement of the uncontradicted fact that the Bank had satisfied $25,-

000 of its debt. (Rec., 170.) We will therefore state in this order the decision of the Master upon the questions of fact to which we filed exceptions, and on which the court based its conclusion that the defendants were entitled to share *pro rata* with the *bona fide* creditors.

I.

The Master's Decision as to the Purpose and Intent with which the Defendants Entered into and Carried Out their Transactions with Fargo & Co. and the Exceptions to his Decision.

The Master found as follows: That the change in the directors, officers and by-laws of the company, and the resolutions authorizing the judgment notes and assignments of account, were for the purpose of giving preferential security to the Rubber Companies, and that the matter was kept secret in order to allow Fargo & Company an opportunity of getting through embarrassments apparently temporary, but not with any fraudulent intent as to the other creditors of the company, and that the arrangement as made was carried out in good faith. (Rec., 162.)

That the advance of the $50,000 on Jan. 6, 1896, and the giving of the securities, were in the belief on the part of Johnson and Sadler, that through this assistance Fargo & Co. would be enabled to continue its business successfully; that the arrangement was entered into in good faith and without any fraudulent intent; and that the parties were not influenced by belief in the insolvency of Fargo & Co. (Rec., 164.) That there was no fraud in fact or want of good faith shown in the conduct of any of the defendants, in respect to the transactions complained of. (Rec., 171.)

He further found that while Fargo & Co. was in fact insolvent on January 6, 1896, the Rubber Companies were ignorant of it, and relied on the representations of Fargo that its assets exceeded its liabilities. (Rec., 163.)

These references to the Master's report show his general findings as to the intent and purpose of the defendants in these transactions. He also made a number of findings as to different facts connected with the matter. These facts and the points in which his findings are claimed by the appealing creditors (Respondents here) to be erroneous are shown by the following exceptions to his report, which are also made a part of the assignments of error. All of these exceptions were overruled by the Circuit Court. (Rec., p. 638.)

Third. "Because the Master should have found that at "the time that Fargo applied to Johnson on January 2, "1896, for assistance on behalf of the Fargo Company, he "informed Johnson that the corporation could not pay its "debts as they matured in the regular course of business, and "that unless it received the assistance which he requested it "would be obliged to fail in business at that time because "of its inability to pay its debts; that upon receiving this "information, Mr. Johnson endeavored to induce Fargo to "give to the Rubber Companies security for all their claims, "which Fargo refused to do, stating that if the assistance "was not given as he requested, so that his company was "compelled to fail, then he would give no preferences to the "Rubber Companies, but would treat all creditors alike." (Exception, Record, p. 627; Assignment of Error, Rec., p. 683.)

Fourth. "Because the Master, in purporting to state "the arrangement made between the Fargos and the Rubber Companies, with reference to the action of the new "directors who were nominated by the counsel for the Rubber Companies, omits to state that it was specifically agreed "and was an essential part of the plan, that these new directors were expected to act as might be necessary to guard

"and protect the interests of Johnson and of the two Rub-
"ber Companies under the agreement made between them,
"and in pursuance of the plan for securing the claims of
"the Rubber Companies and for preventing other creditors
"from obtaining any security which might in any wise in-
"jure or affect the security proposed to be given to the Rub-
"ber Companies." (Exception, Record, p. 627; Assign-
ment of Error, Rec., p. 683.)

Fifth. "Because said Master has found that the change
"of the board of directors and the officers and the changes
"of the by-laws of the Fargo Company and the resolution
"authorizing the judgment notes and assignment of accounts
"were all for the purpose of giving preferential security to
"the Rubber Companies, and that the matter was kept se-
"cret in order to allow the Fargo Company an opportunity
"of getting through embarrassments apparently temporary,
"but not with a fraudulent intent as to the other creditors
"of the company, and that the only purpose of changing
"the board of directors and amending the by-laws was to
"protect the Rubber Companies against the giving by the
"Fargo Company of preferential securities or judgment
"notes to other creditors which should be superior to the
"security of the Rubber Companies, whereas the Master
"should have found that the change in the personnel of the
"board of directors and in the by-laws of the company was
"made for the purpose of withdrawing from the officers of
"the company all power of giving to any other creditor
"security for his debt and for the purpose of preventing
"other creditors from collecting their claims until the
"claims of the Rubber Companies were paid in full, and
"that an essential part of the plan on the part of both parties
"was that it should be kept secret, because they all knew that
"Fargo & Co. could not thereafter obtain goods on credit
"from any one who had knowledge or suspicion of the ar-
"rangement, and that this secrecy was maintained for the
"purpose of enabling Fargo & Co. to obtain goods on credit
"from persons with whom they were then about to deal."
(Exception, Record, p. 627. Assignment of Error, Rec., p.
684.)

Sixth. "Because the Master has found that the arrangement as made between the Rubber Companies and the Fargo Company was carried out in good faith by the parties, whereas he should have found that the arrangement was not in good faith but was in furtherance of a plan to hinder, delay and defraud other creditors." (Exception, Record, p. 628; Assignment of Error, Rec., p. 684.)

Seventh. "Because the Master finds that the Rubber Companies were in ignorance of the fact that on January 6, 1896, the assets of the company were insufficient to discharge its indebtedness, whereas he should have found both from the testimony of Johnson, Sadler, Beale and the other witnesses in the case, that that was the first fact which was called to the attention of the Rubber Companies and was placed before them as the reason why it was necessary that something should be done in order to prevent the Fargo Company from failing at that particular time." (Exception, Record, p. 628; Assignment of Error, Rec., p. 684.)

Eighth. "Because the Master finds that the indebtedness incurred by Fargo & Co. for goods purchased after January 6, 1896, which remained unpaid on August 6, 1896, was only $142,690.95, whereas he should have found that the amount of said liabilities remaining unpaid on August 6, 1896, was upwards of $193,000." (Exception, Rec., 628, 611; Assignments of Error, Rec., 685, 669.)

Ninth. "Because the Master finds that between January 6, 1896, and August 6, 1896, the Fargo Company reduced its general indebtedness to a considerable extent, whereas there is no evidence before him justifying that finding." (Exception, Rec., 628, 611; Assignments of Error, Rec., 685, 670.)

Tenth. "Because the Master's finding that the advance of $50,000 on January 6, 1896, and the giving of the judgment notes and security referred to was the result of an evident feeling upon the part of all parties to the transaction, and was in the belief and expectation on their part that through the assistance which was in this way afforded the Fargo Company, it would be enabled to continue its

"business successfully and become ultimately relieved of "its financial embarrassments, and that such arrangement "was entered into in good faith and without any fraudulent "intent, is not sustained by the evidence, the evidence show- "ing, on the contrary, that the whole arrangement of Janu- "ary 6, 1896, was entered into for the purpose of afford- "ing such security to the Rubber Companies which in- "volved the hindering and delaying of the other creditors "of the company and rendering it impossible for the other "creditors of the company to obtain any security whatever "for the indebtedness due them, in case they applied for the "same, or sought such security, and for the purpose of in- "ducing persons to sell goods upon credit to the company, in "ignorance of the true situation, and by concealing such "situation from them and with the express understanding "that the then maturing notes of L. Candee & Co., aggregat- "ing $44,990, should be paid as they matured absolutely "and unconditionally, and which notes matured in January "and the following February and March." (Exception. Rec., 629; Assignment of Error, Rec., 686.)

Eleventh. "Because the Master has found that the tes- "timony does not show that the parties were influenced "in making the January arrangement, upon a belief of the "insolvency of the Fargo Company at that time, and the "conduct of the corporation afterwards and until about the "time of the entering up of the judgment notes, in the "Master's judgment, clearly indicated a hope and expecta- "tion that the Fargo Company would be finally relieved of "its troubles; whereas the testimony shows that the Master "should have found that the conduct of Johnson and the "Rubber Companies in making the January arrangement, "was precisely what would have been done by them if they "had known of the bankrupt condition of the Fargo Com- "pany at that time, and the testimony shows that Johnson "did know of the insolvent condition of the Fargo Com- "pany at that time, and therefore insisted upon the Janu- "ary arrangement as carried out, and this knowledge fur- "nished both the reason for the making of the arrangement, "and the method by which it was carried out, and included

" in the arrangement the probable contingency of the final " failure of the company by providing for the assignment " of all its accounts; that Johnson did believe that the Fargo " Company was insolvent, is further evidenced by the new " and additional precautions taken to protect the interests of " the Rubber Companies in the consigned goods and the " proceeds." (Exception, Rec., 629; Assignment of Error, Rec., 686.)

Twelfth. " Because the Master finds that the general " creditors of the company from whom goods were purchased " between January and August, 1896, were substantially the " same as prior to that period, whereas such finding is not " justified by the evidence, and the evidence shows that the " goods were purchased from a large number of new credi- " tors, aside from those mentioned in this report." (Exception, Rec., 630; Assignment of Error, Rec., 686.)

II.

The Circuit Court's Decree of Distribution, and the Errors Assigned Thereon.

The Circuit Court made no special finding of facts in its decree, except with reference to the claim of the Metropolitan National Bank, to which we will refer later on—but approved the Master's report. (Rec., p. 638.) It thereupon decreed that the judgments of the United States Rubber Company, L. Candee & Co. and the Metropolitan National Bank, the deed from Fargo & Co. to the bank covering the Dixon property, and the assignment of the accounts, etc., to the United States Rubber Company were fraudulent in law as to the creditors whose claims accrued after January 6, 1896, though not at the time believed by the parties to be such, but on the contrary, believed to have been within their legal rights; that the judgments, conveyances and assignment be annulled, set aside and held for naught, and that

the bank convey the real estate to the receiver. (Rec., 638-9.) It further directed that the receiver should distribute the fund *pro rata* among the creditors who had proved their claims, and the two Rubber Companies and the Bank.

This part of the decree we contend was erroneous in the following respects:

1. The court should have held that the conduct of the two Rubber Companies and the bank was so far fraudulent and inequitable, as against the Respondents, that their claims should have been postponed in payment to those of the latter. Their conduct amounted in substance to a deception, whereby these creditors were induced to give credit to Fargo & Co., and as they intended to induce the giving of this credit, and then, if the company failed, to prevent those who thus became creditors from collecting their claims, they should not be allowed to share on an equality with those who were thus defrauded. It makes no difference that they —in the language of the decree—believed what they did "to be within their rights." There is no legal method of violating the law, nor can a deception be justified, to the prejudice of the person deceived by a belief that no harm would in fact come of it, or that the law justified that kind of a fraud.

The Circuit Court should therefore have directed, as did the Court of Appeals, that the fund be distributed among the creditors named in the decree, excluding the United States Rubber Company, L. Candee & Co. and the Metropolitan National Bank.

The points above presented are also covered by assignments of error, numbered 18, 19, 20 and 25, 26, 27, to which we refer. (Rec., pp. 689-692 and 675-677.)

III.

The $10,000 Procured from the Metropolitan National Bank at the Time of the Failure and Included in its Judgments.

As to this $10,000, the Master found that when it was procured Charles E. Fargo stated to Mr. Keith that the company owed him and his brothers more than that amount for money raised on their individual notes, secured by their bank stock as collateral, and which had been paid to the company for use in its business; and that if the Bank would loan the company that amount so that it could pay him and his brothers, and enable them to take up their notes, he would procure from the company judgment notes covering the Bank's entire claim, including this $10,000; that the Bank acceded to this proposition and loaned the $10,000, receiving two judgment notes of $25,000 each; that at the time of completing the arrangement the Bank did not know of the change in the directors, or in the by-laws of Fargo & Co., but did know that the Rubber Companies were also entitled to enter judgment on their notes (Rec., 169), and that the Bank was not shown to have been guilty of any actual fraud against the other creditors. (Rec., 171.)

These conclusions of the Master we contend were erroneous. The exceptions to his report attacking them, which were all overruled by the court, were as follows:

Thirteenth. "Because the Master erroneously states in "his report that on or about August 3, 1896, Charles E. "Fargo stated to the president of the Metropolitan National "Bank that his company would be obliged to fail unless it "received some assistance, whereas, the fact is, as shown by "the evidence, that Charles E. Fargo called upon the presi- "dent of the Metropolitan National Bank for the purpose

"of borrowing $10,000 for the benefit of himself and his "brothers, and for their private uses, according to the testi- "mony; and the Master should have found that at this in- "terview Fargo explained to Mr. Keith that his company "was about to fail, and his transactions with him with ref- "erence to the loan of $10,000 were in contemplation of its "immediate failure." (Exception, Rec., 630; Assignment of Error, Rec., 687.)

Fourteenth. "Because the Master states that at the time "of said interviews the said C. E. Fargo represented to the "president of said Bank that the said C. H. Fargo & Co. "was indebted to him and his brothers for money exceeding "$10,000 which they had borrowed upon their notes for the "benefit of the company and which they had paid over to "the company for use in its business and that said Fargo "brothers had put up some bank stock that they owned as "collateral to said notes; and C. E. Fargo thereupon pro- "posed to said Bank that if it would loan said C. H. Fargo "& Co. $10,000 in addition to its then existing loan, so that "said company could reimburse him and his brothers and "enable them to take up said notes, he would procure from "the said C. H. Fargo & Co. judgment notes for said Bank, "both for said sum so advanced as aforesaid, and also for "notes then remaining due said Bank to the amount of $40,- "000, whereas the Master should have found that Mr. Fargo "told Mr. Keith that his company was about to fail; that "the Rubber Companies held judgment notes for the amount "of their claims and had held them since January; that he "and his brothers, in view of the failure of the company, "had to have some money for the private benefit of himself "and his brothers, and that he wished to have an additional "loan of $10,000 made on the company's paper for that "purpose, stating that he thought the company owed it to "him and his brothers, and that if the Bank would advance "this money to be used for this purpose, Fargo would obtain "for the Bank the same preferential security for the entire "claim, including $10,000, as the two Rubber Companies "had already obtained, and were about to enforce; that the "president of the Bank acceded to this request and loaned

"$10,000 with knowledge of the purpose for which it was "intended to be used, and that the money so obtained was "thereupon divided between Charles E. Fargo and his two "brothers." (Exception, Record, 631; Assignment of Error, Rec., 687.)

Fifteenth. "Because the Master erroneously finds that "the Metropolitan National Bank did not know of the "change in the board of directors or of the by-laws of Fargo "& Company at the time it completed the arrangement for "the loan of the $10,000 and the procuring of security for "its claim against Fargo & Company, whereas he should "have found that the Bank loaned said money and com- "pleted the transaction of obtaining security with full know- "ledge of those facts, and for the purpose of getting the "some preferences before then given to the Rubber Com- "panies." (Exception, Rec., 631; Assignment of Error; Rec., 688.)

Sixteenth. "Because the Master has found and stated "that the Metropolitan National Bank is not shown to have "been guilty of any actual fraud as against complainant and "the other creditors of the Fargo Company by reason of any "of its transactions with Fargo & Co., or the Rubber Compa- "nies, whereas he should have found that said Bank was guil- "ty of actual fraud in connection with said transactions, and "took its security for the purpose of hindering, delaying and "defrauding the other creditors and with knowledge of the "intent with which the securities had been given to the Rub- "ber Companies." (Exception, Rec., 632; Assignment of "Error, Rec., 688.)

Seventeenth. "Because the Master should have found "that the $10,000 which was advanced by the Metropolitan "National Bank in August, 1896, was procured by Fargo "in the name of the corporation, but for the personal use "of himself and his brothers, and in view of the fact that the "corporation was unable to pay all its creditors and was "then about to fail, and that its property was to be immedi- "ately seized under executions in favor of the Rubber Com- "panies and in favor of the Bank, both for its old indebted- "ness and for the $10,000 thus added, and that all of these

"facts were known to the Bank at the time it loaned its "money and procured the judgment notes and the deed of "the Dixon property, and were known also to the representa- "tives of the Rubber Companies at the time they took the "assignment of the accounts and entered judgment on their "notes, and at the time they made the agreement with the "Bank by which both parties agreed to unite their efforts "in the enforcement of their respective claims." (Exceptions to the Master's report, and each of them, and that this tion, Rec., 633; Assignment of Error, Rec., 688.)

We contend that the court erred in overruling these exceptions fraud which tainted the whole transaction, and that in any event the bank could not enforce as against other creditors the payment of this $10,000. The corporation at that time loan for the personal benefit of the Fargos was an actual was concededly insolvent, so that the rule which prohibits directors and officers from using their official position to secure a preference for their own claims was in full force. The Fargos could not have given a judgment note to themselves and enforce it against other creditors, for whom they were trustees. These facts the bank knew, and it knew also that in the transaction they were not representing, or seeking to secure, the interests of the corporation, but their own. Fargo's agency for the corporation was purely fictitious and illegal, for it was an agency in which he sought to use its name for his personal benefit. Of this the Bank, even on its President's testimony, concededly had knowledge. Fargo's own testimony was that he told Keith that as the company was going to fail he and his brothers wanted $10,000 because they had to have something to live on, and if Keith would give it to them they would give him the company's judgment notes for the whole claim and put him on the same footing as the Rubber Companies. (Rec., 191, 192.) He was an adverse witness, with no possible interest in coloring

his testimony in favor of the complainants, and no one can doubt that this is substantially what took place.

We further contend that the judgments of the Rubber Companies and their assignment of accounts were likewise tainted and permeated with the fraud connected with this $10,000 transaction, for it was consummated with their full knowledge, approval and active assistance, and at the same time the Rubber Companies had entered into a contract with the Bank by which they were entitled to share *pro rata* in the proceeds of the Bank's fraudulent claim of $50,000, and the Bank was likewise entitled to share *pro rata* in the Rubber Companies' judgments and assignment of accounts, *i. e.*, all the claims and securities of all the parties were pooled and intermingled in a sort of partnership arrangement, and thereby became one joint matter.

These points are also covered by assignments of error numbered 23, 28 and 30 to which we refer. (Rec., 690-692.)

IV.

The Amount at which the Claim of the Metropolitan National Bank was Allowed in the Decree.

With the $10,000 (which was advanced as a part of the scheme of failure) included, the total debt of the bank was $50,000. It surrendered the plain notes theretofore given by Fargo & Co. and received two judgment notes of $25,000 each. It is entirely undisputed that by express agreement one of these notes was paid by the transfer of the Dixon property, and the note cancelled and surrendered. This was admitted in the answer of the Bank (Rec., 114), testified to by all the witnesses, and Fargo had the cancelled note

in his possession when on the stand. (Rec., 199.) Mr. Porter, the attorney for the Rubber Companies, testified that the Bank's debt was thus reduced to $25,000, and that by the pro rating agreement between it and his clients, the latter were entitled to share in anything the Bank received from the land. (Rec., 455.;)

The Circuit Court in its decree, however, found that at the time the receiver was appointed in this cause (January 18, 1897), there was due from C. H. Fargo & Co. to the Bank the sum of $50,000 (Rec., 639), and distribution was awarded to it on that basis—concededly a false one.

It was shown that after the appointment of the receiver a mechanics' lien suit was begun against the property to enforce the claims of creditors of Fargo & Co. existing when the deed was given. The Bank allowed the suit to go by default and thus lost its title to the land, which was sold under the decree in that suit. At the hearing the complainant presented and asked leave to file an amendment, stating these facts, and withdrawing its prayer that the Bank be required to surrender the land, but on the objection of the defendants the leave was denied. (Rec., 252.)

We contend that the complainant had a right to withdraw its claim for relief against this property; that these facts precluded the court from making any decree against the property, and that the Bank having, without any fraud or imposition being practiced upon it, deliberately taken the deed in satisfaction of $25,000 of its debt, cancelled the note, asserted in its answer that the debt was paid, and its title under the deed unassailable, and having defended the suit on that theory without a change of front from start to finish, the court erred in giving it a benefit from its fraud in restoring its cancelled debt and enforcing it against the

creditors when it could not have been enforced against the debtor.

This point is presented by assignments of error, numbered 1 and 23, to which we refer. (Rec., 682, 690; also 668, 676.)

NOTE. Separate exceptions to the Master's report were filed by certain intervenors who joined as appellants in the cross-appeal in the Court of Appeals and are Respondents here. These exceptions, which were likewise all overruled by the court, challenge the correctness of the Master's report on substantially the same grounds, and in the same respects as the exceptions of the other Respondents, which have already been quoted in this specification of errors, but they are couched in somewhat different language. The overruling of these separate exceptions is made the basis of separate assignments of error on the part of intervenors by whom they were filed. We have quoted these exceptions verbatim and make them a part of this specification of errors, but in order to avoid confusion of statement, they are printed separately from the foregoing specification of errors:

These exceptions, which were all overruled by the court, are as follows:

Exceptions directed against the findings of the Master regarding the January arrangement and the motives and conduct of the parties in that connection.

First. For that the Master finds that the Rubber Companies were in ignorance of the fact that on January 6, 1896, the assets of the Fargo Company were insufficient to discharge its indebtedness.

Whereas the Master should have found that the insolvency of the Fargo Company and its then imminent suspension

were the first facts called to the attention of the Rubber Companies in January at the Auditorium meetings, and were the reasons why the Rubber Companies' representatives were summoned to Chicago. (Exception, p. 611; Assgt. of Error, Rec., 668.)

Second. For that the Master fails to find that the Rubber Companies at first refused to make any loan or advance to the Fargo Company, and demanded that the Fargo Company should prefer the Rubber Companies to the exclusion of all other creditors, which the Fargo Company refused to do, and stated that if the Rubber Companies refused to advance the $50,000 the Fargo Company would make an assignment and treat all of its creditors on an equality, and that thereupon the Rubber Companies, in order to prevent the Fargo Company from doing this, consented to make the $50,000 advance, on condition that the January arrangement would be carried out.

Whereas the Master should have so found. (Exception, p. 623; Assgt. of Error, Rec., 668.)

Third. For that the Master finds that the change of the board of directors and the officers and the changes of the by-laws of the Fargo Company and the resolution authorizing the judgment notes and assignment of accounts, were all for the purpose of giving preferential security to the Rubber Companies, and that the only purpose of changing the board of directors and amending the by-laws, was to protect the Rubber Companies against the giving by the Fargo Company of preferential securities or judgment notes to other creditors which should be superior to the security of the Rubber Companies;

Whereas, the Master should have found that the change in the personnel of the board of directors and in the by-laws

of the company was made for the purpose of withdrawing from the officers of the company all power of giving to any other creditor security for his debt, and for the purpose of preventing other creditors from collecting their claims until the claims of the Rubber Companies were paid in full, and for the purpose of placing the Fargo Company and all its assets in the absolute control of the two Rubber Companies so that the two Rubber Companies might make any disposition of the Fargo Company and its assets which they saw fit, in their own interest, and to the exclusion of all other creditors. (Exception, p. 609; Assgt. of Error, Rec., p. 668.)

Fourth. For that the Master finds that the change in the board of directors and officers, and the changes in the by-laws of the Fargo Company were kept secret in order to allow the Fargo Company an opportunity of getting through embarrassments apparently temporary, but not with a fraudulent intent as to the other creditors of the company;

Whereas, the Master should have found that in order to secure and preserve the credit of the Fargo Company and to enable it and its agents to purchase merchandise on credit after January 6, 1896, it was expressly understood and agreed and insisted upon as a part of said January arrangement, by all parties thereto, that the same should be kept and maintained secret and unknown to the world, and that the same were so kept and preserved secret and unknown to the world, with a fraudulent intent as to the other creditors of the Fargo Company. (Exception, p. 610; Assgt. of Error, Rec., p. 669.)

Fifth. For that the Master finds that the advance of $50,000, and the giving of the judgment notes and security in question was the result of an evident feeling on the part of all the parties to the transaction, and in the belief

and expectation on their part, that through the assistance which was in this way afforded the Fargo Company, it would be enabled to continue its business successfully, and become ultimately relieved of its financial embarrassment, and that such arrangement was entered into in good faith, and without any fraudulent intent;

Whereas, the Master should have found that said January arrangement was not the result of any such feeling, belief or expectation, and was not entered into in good faith and without fraudulent intent.

And whereas also the Master should have found that the Rubber Companies and their agents had no confidence, either in the financial condition of the Fargo Company, or in the honesty and personal integrity of the Fargos themselves, and, therefore, secured control of the corporation by controlling its board of directors and officers, compelled the Fargo Company to set apart one of its floors as the store room of the Rubber Companies, wherein to keep their consigned goods; to deposit the proceeds arising from the sale of consigned goods in a separate bank account; to keep separate books and records of all transactions between the Rubber Companies and the Fargo Company, and employed every possible agency to protect themselves, as a cautious man would have done had he believed the Fargo Company hopelessly insolvent and the Fargos themselves personally dishonest. (Exception, p. 612; Assignment of Error, Rec., p. 670.)

Sixth. For that the Master finds that the testimony does not show that the parties were influenced in making the January arrangement by belief of the insolvency of the Fargo Company at that time, and that the conduct of the corporation afterwards, and until about the time of the entering up of the judgment notes, clearly indicated the hope and ex-

pectation that the Fargo Company would be finally relieved of its troubles.

Whereas the Master should have found that the parties were not influenced by any such belief, and that the conduct of the corporation did not indicate any such hope or expectation, but that, on the contrary, the parties were influenced in making the January arrangement, by a firm conviction that the Fargo Company at that time was insolvent, and that its continuance in business could only be temporary, and that the January arrangement was the only possible means by which the Rubber Companies could avoid the almost certain loss of a large proportion of their claims against the Fargo Company, including the consigned goods then on hand, in all amounting to over $300,000. (Exception, p. 613; Assignment of Error, Rec., p. 671.)

Seventh. For that the Master fails to find that the formation of the January arrangement,in itself,and the operations of the Fargo Company and the Rubber Companies thereunder were an actual fraud on the persons, firms and corporations which sold merchandise or loaned money to the Fargo Company from and after January 6, 1896, and whose claims, or any part thereof, for such merchandise and loans, have not been paid, irrespective of the transactions and arrangements entered into and done by and between the Rubber Companies, Charles E. Fargo, the Fargo Company and the Metropolitan Bank in August, 1896.

Whereas the Master should have so found. (Exception, p. 622; Assignment of Error, Rec., 668.)

For that the Master finds that nothing occurred between January 6 and August 6, 1896, inconsistent with the theory that the business of the corporation was carried on with an evident purpose and expectation of continuing same.

Whereas the Master should have found that the course of dealing after January 6, 1896, demonstrated that the Rubber Companies were substantially convinced during all that period that the financial condition of the Fargo Company was practically hopeless and that its final collapse could only be temporarily delayed. (Assignment of Error, p. 671; Exception, p. 614.)

For that the Master fails to find that by reason of the control which said Rubber Companies exerted over the Fargo Company by means of said January arrangement, said Rubber Companies, from and after January 9, 1896, constituted substantially the Fargo Company, and that the goods, wares and merchandise so purchased by the Fargo Company from and after January 9, 1896, were in substance and in fact purchased by said Rubber Companies.

Whereas the Master should have so found. (Assignment of Error, p. 678; Exception, p. 622.)

Exceptions directed against the findings of the Master regarding transactions with the Metropolitan Bank in August.

Eighth. For that the Master finds that on or about August 3, 1896, Charles E. Fargo stated to the president of the Metropolitan Bank that the Fargo Company would be obliged to fail unless it received some assistance.

Whereas the Master should have found that Charles E. Fargo did not apply to, or suggest that said Bank should furnish the Fargo Company any assistance, but on the contrary, it is clearly shown by the evidence that Charles E. Fargo called upon the president of the Metropolitan Bank, on or about August 4, 1896, for the purpose of borrowing $10,000 for the benefit of himself and his brothers, and for their private use, and that at this interview he explained to

said president that the Fargo Company was about to fail, and that all the transactions had by Charles E. Fargo with said Bank in relation to said proposed loan of $10,000 were had in contemplation of the immediate failure of the Fargo Company. (Exception, Rec., 614; Assignment of Error, Rec., 672.)

Ninth. For that the Master finds that the Metropolitan National Bank did not know of the change in the board of directors or of the by-laws of the Fargo Company at the time it completed the arrangement for the loan of the $10,000 and the procuring of security for its claim against the Fargo Company.

Whereas the Master should have found that the Metropolitan Bank first obtained the two judgment notes for $25,000 each, and the agreement by which it was to share and pro rate with the Rubber Combanies in the securities they held, before it paid the $10,000 over to Charles E. Fargo, and that said $10,000 were so paid, with full knowledge on the part of the Bank concerning the January arrangement made with the Rubber Companies, and was not, in fact, paid over to the Fargos until all the arrangements had, on August 4, 5 and 6, as shown by the resolutions of the Fargo Company and the acts of its officers, had been consummated. (Exception, 615; Assignment of Error, Rec., 672.)

Tenth. For that the Master finds that the Metropolitan National Bank is not shown to have been guilty of any actual fraud as against complainant and the other creditors of the Fargo Company by reason of any of its transactions with the Fargo Company or the Rubber Companies.

Whereas the Master should have found that said bank was guilty of actual fraud in connection with said transactions, and took its security for the purpose of hindering,

delaying and defrauding the other creditors, and with knowledge of the intent with which the securities had been given to the Rubber Companies, and that the Fargos would appropriate the $10,000 loaned to them, to their own sole use and benefit, and place the same beyond the reach of the creditors of the Fargo Company. (Exception, 616; Assignment of Error. Rec., 673.)

Respectfully submitted.

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